No. 286

IN THE

Supreme Court of the United States

October Term, 1958

EDGAR V. MAHER,
Petitioner,

v.

HARRIS ELLSWORTH, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Edgar V. Maher, appellee below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 12, 1958 (R. 22).

OPINIONS BELOW

The District Court rendered an oral opinion in favor of the petitioner which is set forth on page 13 of the record. The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth on pages 20 and 21 of the record. It is also printed in the appendix at page 16.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June

12, 1958 (R. 22). This petition for certiorari is filed within ninety days from the date of the judgment in accordance with the provisions of Title 28 U.S.C. 2101 (c).

STATUTES AND EXECUTIVE ORDERS OF PRESIDENT INVOLVED

"Provided, That in making any reduction of force in any of the Executive Departments, the head of such Department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors."

Act of August 15, 1876 (19 Stat. 143, 169).

Congress amended the 1876 Act on August 23, 1912, as follows:

". . . . in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged, or dropped, or reduced in rank or salary."

(c.350, sec. 4, 37 Stat. 413; 5 U.S.C. 648)

Executive Order No. 4240—June 4, 1925:

"Executive Order of June 4, 1925 will be construed to require that in selecting employees to be demoted or separated on account of any reduction of working forces honorably discharged soldiers, sailors and marines, and the widows of such, and the wives of injured soldiers, sailors, and marines, who themselves are not qualified for positions in the Government service, will be placed at the top of the lists of competing employees, in the order of their ratings, provided they attained for the last rating period an efficiency rating of not less than 80; and they will be retained in existing status, if their record in respect to deportment, attitude, and attendance is satisfactory, in preference to all other persons with whom they are respectively in competition.

"Provisions of civil-service rule. Civil-service rule XII, Section 5, provides as follows: 'In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good, or if his efficiency rating is equal to that of any employee in competition with him who is retained in the service.'"

"Reduction of force in excepted positions—The President of the United States has informed the Commission that it is his desire that in making reductions in force the civil-service rules be applied by all agencies which are to be on a permanent basis. The provisions of Section 5 of Rule XII should therefore be applied regardless of the place of employment, and should also be applied in regular branches of the Government in making reductions in force in *excepted* as well as classified positions."

"Sec. 851. Persons entitled to federal employment preferences. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive orders; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits; or pension by reason of public laws administered by the Veterans' Administration, the Department of the Army or the Navy Department; (2) the wives of such service-connected disabled ex-service men as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on

active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions. (June 27, 1944, c. 287, Sec. 2, 58 Stat. 387, amended July 26, 1947, c. 343 Title II, Sec. 205 (a), 61 Stat. 501)." 5 U.S.C. 851

"Sec. 861. Reduction in personnel; considerations affecting release. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings:. Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service:. Provided further, That preference employees who efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. (June 7, 1944, c. 287, Sec. 12, 58 Stat. 390). 5 U.S.C. 861

"Sec. 867. Repeal of inconsistent laws: saving clause. All Acts and parts of Acts inconsistent with

the provisions hereof are hereby modified to conform herewith, and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil service rule or regulation, of any department of the Government or officer thereof. (June 27, 1944, c. 287, Sec. 18, 58 Stat. 391.)" 5 U.S.C. 867

QUESTIONS INVOLVED ON APPEAL

The petitioner brought this suit for a declaratory judgment fixing and determining his rights as a permanent civil service employee of the United States with veterans preference. In determining his status, the question of whether one William A. Friedman was entitled to veterans preference in his employment with the United States government was the determining factor. Friedman was called in the draft on July 17, 1918, and was not accepted for military service, and was discharged from the draft four days later on July 21, 1918. The United States Civil Service Commission held that he was entitled to Veterans' preference. Due to a reduction in force in the Regional Office of the Veterans Administration at St. Louis, Missouri, the petitioner was reduced in grade, and Friedman was retained solely on the grounds that he was entitled to veterans' preference. The petitioner challenges the ruling of the Court of Appeals to the effect that Friedman, who never was accepted for military service, was entitled to veterans' preference. It is conceded that if Friedman was not entitled to preference in retention in grade, that he should have been reduced in grade and the petitioner retained in the grade which he held.

STATEMENT OF THE FACTS

This suit was brought in the nature of a declaratory judgment fixing and determining the rights of the petitioner as a civil service employee with a permanent status,

and with veterans' preference, against the then Commissioners of the United States Civil Service Commission, and the then Administrator of Veterans Affairs (R. 3a). Proper substitution of parties have been made both as to the Commissioners of the Civil Service Commission, and the newly appointed Administrator of Veterans. (R. 10a) The petitioner was employed in the Regional Office of the Veterans Administration at St. Louis, Missouri. (R. 4a) On August 12, 1956 he was reduced in grade from GS-11 to a GS-9 due to a reduction in force in the said Regional Office. (R. 5a) One Friedman was a GS-11 employee doing the same type of work at which the petitioner was employed, both Friedman and the petitioner were Supervisory Adjudicators in the said Regional Office. In the reduction in force the officials of the Regional Office claimed that Friedman was entitled to veterans' preference, and since he had longer retention credits he should be maintained in the position and grade of GS-11 Supervisory Adjudicator. (Par. 13-5a) The petitioner enlisted in the military service on May 6, 1917, and honorably served continuously until the date of his discharge on October 20, 1919 (See Par. 8 of complaint 4a).

It is not disputed that if Friedman was not a veterans preference eligible that he should have been reduced in grade from a GS-11 to a GS-9, and the petitioner should have been retained in the grade of a GS-11. The sole question of whether the petitioner was entitled to relief is predicated on the question of the decision of the United States Civil Service Commission to the effect that a man who was called in the service under the draft but was never accepted for military service is entitled to veterans' preference. The United States District Court for the District of Columbia held that Friedman was not entitled to veterans' preference and rendered judgment accordingly. (R. 14a) The Court of Appeals reversed. (R. 20-21a)

SPECIFICATIONS OF ERRORS TO BE URGED

The petitioner will argue that the decision of the United States Court of Appeals for the District of Columbia reversing the judgment in favor of the petitioner in the District Court conflicts with the decisions of this Court and awards and grants preference in employment to a person who was never legally entitled to such preference in employment and that the decision is based upon an unwarranted and illegal order of the United States Civil Service Commission which said order was and is utterly void, and of no legal effect. That the interpretation of the statutes and said illegal order in favor of the respondents conflict with the decisions of this Court holding that the spirit and intent of Congress governs the interpretation of the statutes, and not the literal words contained therein, which decisions will be cited in this petition in the reasons for the granting of the writ of certiorari.

REASONS FOR GRANTING THE WRIT

The petitioner asserts that a writ of certiorari should issue in this case pursuant to Rule 19 (10)(b) of this Court for the reason that the Court of Appeals below has rendered a decision in conflict with the decisions of this Court, and has also decided an important question of Federal law contrary to the clear intent of Congress in establishing preference for veterans in governmental employment.

For the convenience of the Court the pertinent statutes and Executive orders of the President of the United States have been printed in this petition. (p. 2-5)

At the very outset the Court of Appeals below has lost sight of the intent of Congress in establishing preference for veterans in governmental service. The statutes commencing with the Act of August 15, 1876 (p. 2) granted preference only to honorably discharged soldiers, sailors,

and marines, and this limitation was carried forward in the Act of August 23, 1912 (p. 2) as well as in the Executive orders of the President (p. 2-3). The same was also carried forward in the Veterans Preference Act of June 27, 1944 the pertinent sections, Sections 2, 12, and 18, are outlined on pages 2-5 of this petition.

The petitioner wants particularly to invite to the attention of the Court that the preference granted to members of the armed forces was solely limited to those who had served honorably and who were given honorable discharges from the service. No other members of the armed forces who received other than honorable discharges are entitled to preference in governmental employment.

The Attorney General of the United States, Mr. Stone, later Chief Justice of this Court, in interpreting the statutes, and the Executive Orders of the President of the United States granting preference, held that the preference applied only to honorably discharged soldiers, sailors, and marines. (34 Opin. Atty. General 159)

This opinion was rendered long before the passage of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 851).

Many other types of discharges were given by the Army, Navy, and Maring Corps, but members of the armed forces who received other than Honorable Discharges were not entitled to preference under any of the Statutes or Executive Orders of the President of the United States. The decision of the Court below is predicated upon "service alone". Service could have been performed by those who received dishonorable discharges, or discharges without honor yet they never were entitled to preference in governmental employment.

The statutes, regulations, and Executive orders of the President of the United States all requiring honorable service with the Armed forces are all set out by this Court

in the opinion of this Court in the case of *Hilton v. Sullivan, 334 U.S. 323.*

In this case we have the Court of Appeals below holding that a man who never was sworn into the service of the United States, and never became a member of the armed forces, is entitled to veterans preference in governmental employment.

The Veterans Preference Act of June 27, 1944 was limited to the persons named in Section 2 of this Act (5 U.S.C. 851 p. 3) and did not include peace time veterans.

40 Op. Atty. Genl. 425

A person who was inducted into the service, and later discharged because of cancellation of the draft, was not within the contemplation of the Veterans Preference Act.

40 Op. Atty. Genl. 425

The Court below held that an order of the Civil Service Commission (R. 11a) entered on June 10, 1931 to the effect that persons discharged from the draft were entitled to preference in governmental employment was validated by Section 18 of the Veterans Preference Act of June 27, 1944, which reads as follows:

> "Sec. 867. Repeal of inconsistent laws: saving clause. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof. June 27, 1944, c.287, Sec. 18, 58 Stat. 391.)" 5 U.S.C. 867

The Court held that the rights of those discharged from the draft were protected by this saving clause of the Veterans Preference Act. The purpose of the saving clause was to protect the rights of peace time soldiers, sailors, or

marines who came within the provisions of the Statute of 1876, the Act of 1912, and the Executive orders of the President prior to the enactment of the Veterans Preference Act of June 27, 1944.

The attention of the Court is specifically directed to the words "any preference eligible" contained in the saving clause. A person who was discharged from the draft never was a "preference eligible" under any lawful order issued by the Civil Service Commission. To be entitled to the benefits of the saving clause it must be shown that the person whose rights are protected come within the provisions of the saving clause.

When the illegal order of the Civil Service Commission was issued on June 10, 1931 (R. 11a) the Statutes granting the preference was limited as far as service men and women were concerned to those who actually served in the armed forces, and received an honorable discharge. The person discharged from the draft did not receive an honorable discharge any more than the person who may have received a dishonorable discharge. The order of the Civil Service Commission granting such preference was in effect legislation by the Civil Service Commission for the reason that it could not be issued under any statute of the United States granting preference to members of the armed forces. The order was absolutely null and void and of no legal effect. Any administrative orders must be within the statutes, otherwise they are a mere nullity.

Waite v Macy, 246 U.S. 606
Colorado v Toll, 268 U.S. 228

This is not the first time that the Civil Service Commission and the Court below has endeavored to grant preference to employees of the United States who never were in the active service, or who never received honorable discharges.

In the case of *Mitchell v Cohen*, 333 U.S. 111, the Civil Service Commission granted veterans preference to tem-

porary members of the Volunteer Port Security Force of the Coast Guard who for periods on weekends did guard duty for short periods of time. A ruling of the Civil Service Commission substantially as that which granted preference to persons discharged from the draft was issued prior to the Veterans Preference Act of June 27, 1944.

The order granting preference was cancelled after the passage of the Veterans Preference Act. One Cohen, who was in this Volunteer Force, brought a suit to compel the members of the Civil Service Commission to grant him preference in governmental employment. The District Court held in his favor, *69 Fed. Supp. 54*, and on appeal the Court below affirmed, *82 App. D.C. 83; 160 Fed 2d 915*. This Court granted the writ of certiorari and reversed the judgment of the Court of Appeals below.

In rendering the decision against this petitioner, the Court below fell into the same error as it did in the Cohen case. Cohen claimed as the respondents did below that his rights were preserved under Section 18 of the Veterans Preference Act which has been previously quoted (p. —).

In the first place a person discharged from the draft never served honorably in the military or naval service. He was not a "preference eligible" whose rights were preserved. Since such a person was never entitled to preference, a void order of the Civil Service Commission issued without lawful authority could not preserve his rights because he never had any. The ruling of the Civil Service Commission is so out of line with the aims and purposes of Congress that it was without any legal effect. Petitioner invites attention to the following cases on statutory construction.

The case cited by the distinguished Judge Holtzoff (R. 13a) *Church of Holy Trinity v United States, 143 U.S. 457 36 L.Ed. 226* is directly in point. In that case the statute

prohibited the importation of persons into the United States where they had been hired abroad. The Church employed a Rector from England to take over the church work in New York City. The employment was literally contrary to the terms of the statute. This Court, however, held among other things,

> "If a literal construction of words of an Act be absurd, the Act must be construed to avoid the absurdity. The Court must restrain the words. The object designed to be reached by the Act must limit and control the literal import of the terms and phrases employed. All laws should receive a sensible construction. In construing an Act, the function of the Courts is to effect the intent of Congress".

The rule adopted by this Court in construing statutes is that where certain rulings produce an unreasonable result plainly at variance with the policy of the legislation as a whole, the Court may follow the purpose of the statute rather than the literal words.

United States v N.E. Rosenblum Truck Lines, 315 U.S. 50, 55, 86 L.Ed. 671, 676, 62 S.Ct. 445.
United States v American Trucking Assos., 310 U.S. 534, 541, 84 L.Ed. 1345, 1350, 60 S.Ct. 1059.
Markham v Cabell, 326 U.S. 404, 409, 90 L.Ed. 165, 168, 66 S.Ct. 193.
United States v Kirby, 7 Wall (US) 482, 486, 487, 19 L.Ed. 278, 280.
United States v Dickerson, 310 U.S. 554, 562, 84 L.Ed. 1356, 1362, 60 S.Ct. 1034.
Scarborough v Atlantic Coast Line, 178 F.2d 253 4th CCA, Cert. denied 339 U.S. 919.
Elizabeth Arden Inc. v Federal Trade Commission, 156 F.2d 132, Cert. denied 331 U.S. 806.

That which is within the letter but not within the spirit is not within the statute.

U. S. v 21 Pounds, 147 F.2d 78 4th CCA.
Thompson v Terminal Shares, 194 F.2d 1, 8th CCA. Cert. denied 308 U.S. 559.

Marsh v. New York Life Ins. Co., 89 F.2d 932, 6th CCA, Cert. denied 302 U.S. 716.

The Department of Justice cited some of these cases in their brief filed in Mitchell v Cohen, supra.

The Court below has attempted to overrule the decision of this Court in the case of Mitchell v Cohen, supra, or else has totally disregarded that decision as binding on them.

Congress never granted preference to any person in the military or naval service except those who serve honorably. It was never the intent of Congress to grant preference to those discharged from the draft. To so contend, would be the height of absurdity, and the construction placed on the saving clause should be construed and governed by the intent of Congress rather than on the words contained in the saving clause.

Nothing appears in any of the reports of Congress showing that the members knew that the Civil Service Commission acting in a legislative capacity had granted preference to persons outside the class limited by Congress. The purpose of the saving clause was to preserve the rights of peace time veterans, the widows of honorably discharged soldiers, and sailors, and others to whom Congress itself had granted preference in governmental employment. In construing "preference eligible" contained in the saving clause, it should be construed by the intent of Congress, and this to the effect that only honorably discharged soldiers, sailors, or marines come within the words.

The illegal order of the Civil Service Commission was probably predicated upon the decision of the Court of Appeals below in the case of *Hurley v Crowley, 60 App. D.C. 245*, which held that a person called in the draft but retained for a period of nine weeks was entitled to veterans preference. This case was referred to in the oral

opinion of Judge Holtzoff (R. 13a). The Court below in the Crowley case emphasized the period that Crowley was held in the service. This was the most important factor. The case involved the question of constructive acceptance for military service. Counsel for the petitioner is reliably informed by the officials of the Department of the Army charged with the duty of correcting military records that the Provost Marshall charges with the administration of the Selective Service Act of 1917 held that where a draftee was held for a period of more than 30 days he would be deemed to have been constructively accepted for military duty. Persons falling within these rulings were entitled to an honorable discharge if their service was otherwise honorable. The end result in the Crowley case was proper but not on the basis of the opinion rendered by the Court below.

Attention is also directed to the fact that the Court of Appeals below apparently overruled their prior decision in the case of *McDougall* v *U. S. Civil Service Commission*, (R. 21a), *92 U.S. App. D.C. 69*. In that case, the Court below held a person called in the draft and discharged from it was not entitled to veterans' preference. This Court denied a petition for certiorari in the McDougal case, *345 U.S. 969*, and at least by inference agreed with their decision in that case. Now since the Court below apparently has overruled their prior decision, it should furnish good grounds for the issuance of the writ in this case.

In any event, the fact that Congress of the United States never granted preference in governmental employment except to those who served honorably in the service, and received honorable discharges or to the widows or kind of such honorably discharged soldiers, sailors, or marines, cannot be disputed. The preference was limited to those permitted classes.

It was not disputed at any time if Friedman was not a veteran preference eligible that the petitioner would be retained and Friedman should have been reduced in grade.

This question in reduction in force cases has already been decided by the United States Court of Appeals in the case of *Reynolds et al* v *Lovett et al, 201 F.2d 181, 91 U.S. App. D.C. 276.* This Court denied certiorari in that case, *345 U.S. 926.*

CONCLUSION

The decision of the Court below clearly conflicts with the decisions of this Court particularly on the question of the rule applying to statutory construction to conform with the intent of Congress. The decision below reaches an absurd conclusion by granting preference in governmental employment to persons never actively in the military service of the United States. Preference to Veterans, and their dependents, means exactly what the term implies that the preference must be predicated upon persons who honorably served in the military or naval service, and not to persons who never were sworn into the active military service of the United States.

WHEREFORE, the petitioner prays that a writ of certiorari issue directed to the United States Court of Appeals for the District of Columbia Circuit, and that upon a review by this Court, that the judgment of the said Court of Appeals be in all things reversed, set aside, and held for naught, and this cause be remanded to that Court for consideration in accordance with the views of this Court.

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APPENDIX

Filed June 12 1958 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14281

HARRIS ELLSWORTH, CHAIRMAN CIVIL SERVICE COMMISSION, ET AL., APPELLANTS

v.

EDGAR V. MAHER, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided June 12, 1958

Mr. Donald L. Young, Attorney, Department of Justice, of the bar of the Supreme Court of Wyoming, *pro hac vice*, by special leave of Court, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellants. *Messrs. Lewis Carroll, Harold D. Rhynedance, Jr.*, Assistant United States Attorneys, *Samuel D. Slade* and *Morton Hollander*, Attorneys, Department of Justice, also entered appearances for appellants.

Mr. Claude L. Dawson for appellee.

Before EDGERTON, *Chief Judge*, and FAHY and BASTIAN, *Circuit Judges*.

PER CURIAM: The plaintiff Maher, a veterans' preference eligible employed by the Veterans Administration, was reduced in grade because of a reduction in force. The question is whether one Friedman, who was retained in the plaintiff's former grade, was entitled to veterans' preference. If he was not, he should have been demoted instead of the plaintiff.

Friedman was drafted and sent to camp July 17 1918. On July 21 1918 he was discharged from the draft as

physically unfit. Since 1942 he has worked continuously for the government. In *Hurley* v. *Crawley*, 60 App.D.C. 245, 50 F. 2d 1010 (1931), we held that a man discharged from draft was an honorably discharged soldier entitled to preference under the Acts then in effect. Accordingly a Civil Service Commission Minute of June 10 1931 provides: "Persons presenting discharges from draft are entitled to preference regardless of the length of their military service. . . ." The Veterans' Preference Act of 1944, chap. 287, § 18, 58 Stat. 391, 5 U.S.C. § 867, provides that it "shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." We think it follows that the District Court erred in holding that Friedman was not entitled to preference.

In *McDougall* v. *U.S. Civil Service Commission*, 92 U.S.App.D.C. 69, 202 F. 2d 361 (1953), *cert. denied*, 345 U.S. 969, we held that a man in substantially Friedman's position was not one of the "ex-servicemen" on whom a preference was conferred by § 2 of the 1944 Act, 58 Stat. 387-388, as amended, 5 U.S.C. § 251, because the man never became a "full-fledged" soldier. But that case seems to have been submitted and decided without adverting to the saving clause of the 1944 Act, quoted above, and the preference rights that the man had previously acquired.[1]

Reversed.

---

[1] A Civil Service Commission Minute of May 20 1954 recognizes that "persons discharged from the draft in World War I . . . are entitled to preference under the prior law; and that under section 18 of the Veterans' Preference Act preference cannot be withdrawn if the employee was in the service on the date of the Act and has been continuously employed since that date without a break in service."

Doubtless Friedman could not require the Secretary of War to give him a certificate of honorable discharge from the army in place of the "discharge from draft". *Patterson* v. *Lamb*, 329 U.S. 539. But that is not the issue here.

Filed June 12 1958 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,281

HARRIS ELLSWORTH, CHAIRMAN CIVIL SERVICE COMMISSION, ET AL., APPELLANTS

v.

EDGAR V. MAHER, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

Before: Edgerton, Chief Judge, and Fahy and Bastian, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated: June 12, 1958

Per Curiam.

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No. 286

In the Supreme Court of the United States

OCTOBER TERM, 1958

EDGAR V. MAHER, PETITIONER

v.

HARRIS ELLSWORTH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
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479698—58

QUESTION PRESENTED

Whether a veterans preference granted to a Civil Service employee in 1942, pursuant to a Court of Appeals decision and Civil Service Commission ruling in compliance with that decision, is preserved by Section 18 of the Veterans' Preference Act of 1944.

STATUTES AND RULINGS INVOLVED

The pertinent statutory provisions and Civil Service Commission minutes are as follows:

1. Act of August 23, 1912, c. 350, Section 4, 37 Stat. 413:

> * * * in the event of any reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

2. The Veterans' Preference Act, Act of June 27, 1944, c. 287, Section 18, 58 Stat. 391, 5 U.S.C. 867:

> * * * this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

3. Civil Service Commission Minute 1, June 10, 1931.

> Persons presenting discharges from draft are entitled to preference regardless of the length of their military service. * * *

4. Civil Service Commission Minute 2, May 20, 1954.

> * * * persons discharged from the draft in World War I * * * are entitled to preference under the prior law; and that under section 18 of the Veterans' Preference Act preference cannot be withdrawn if the employee was in the service on the date of the Act and has been continuously employed since that date without a break in service.

STATEMENT

Petitioner, who is employed as an adjudicator at the St. Louis, Missouri, office of the Veterans Administration, brought this suit to compel the Veterans Administration to restore him to a position in grade GS–11 from which he was reduced to a GS–9 grade on August 12, 1956, as a result of a reduction in force order (R. 9). Petitioner admittedly was entitled to the benefits of the Veterans' Preference Act of 1944, with seniority dating from 1945 (R. 9). His suit is based on the contention that veterans preference has erroneously been given to William A. Friedman, another employee in the same office, as a result of which he was retained at a GS–11 grade (R. 5–6). Without that preference, Friedman would have been on a different retention list and he, and not petitioner, would have been the employee forced to accept reduction in rank (R. 9). Friedman, who has worked for the Government continuously since 1942, has, since that date, been recognized by the Civil Service Commission as a veteran, entitled to statutory veterans employment benefits (R. 9).

That recognition was accorded on the basis of the following actions: Prior to 1931, the Civil Service Commission had not granted preferences to persons presenting discharge from the draft (in World War I) certificates. In 1931, in the case of *Hurley* v. *Crawley*, 60 App. D. C. 245, 50 F. 2d 1010, the Court of Appeals for the District of Columbia held that a person who had been inducted into the Army in World War I, and who had then been given a discharge from the draft because he was physically unqualified for military service, was entitled to a veterans preference under the laws existing at that time. (See 37 Stat. 413 and 40 Stat. 1291, as amended, 41 Stat. 37.) The Court of Appeals reasoned that, since a man who is inducted into the Army and has reported to camp is subject to all of the liabilities and loss of civilian rights which go with Army service, such a man is also entitled to the benefits granted by Congress and the President to those who are subjected to Army conditions. The term "honorably discharged" as used in the then preference acts was held to include any discharge given under honorable conditions, and not just the one certificate bearing the title "Honorable Discharge". Based on this decision, the Civil Service Commission granted preferences to employees, such as Friedman, having a discharge from the draft. See Minute 1, June 10, 1931, quoted *supra*, p. 2.

Following the decision of the Supreme Court in *Patterson* v. *Lamb*, 329 U. S. 539, which held that an inductee who got only as far as "the railroad platform" when the draft was cancelled was not entitled to an "honorable discharge" rather than a "discharge

from draft" certificate, the Civil Service Commission issued Minute No. 1 of April 11, 1947, withdrawing veterans preferences from those having a discharge from the draft. However, upon reconsidering this decision in the light of Section 18 of the Veterans' Preference Act of 1944, the Commission issued Minute No. 2 of May 20, 1954, *supra*, p. 3, granting veterans preferences to those having a discharge from the draft and employed in the civil service continuously from a time prior to the 1944 Act.

Thus, the situation when petitioner brought the present suit, was that, under *Hurley* v. *Crawley, supra,* and the Civil Service ruling based on that decision, a person having a discharge from the draft was entitled to a veterans preference, provided that such preference was granted prior to the 1944 Act, so as to be preserved by Section 18 of the 1944 Act.

The District Court, in its oral opinion in favor of petitioner, attempted to distinguish the *Crawley* case and also noted that it seemed absurd to allow a veteran with only a few days service the same rights as a veteran with several years of service (R. 13). The Court of Appeals reversed on the ground that the Civil Service Commission ruling in 1931 was correctly made in compliance with the *Crawley* decision and that the clear language of Section 18 of the 1944 Act preserved Friedman's preference granted pursuant to the 1931 ruling, prior to the 1944 Act (Pet. 16–17).

ARGUMENT

Petitioner's contentions are essentially (1) that the Court of Appeals for the District of Columbia

Circuit misinterpreted its own decision in *Hurley* v. *Crawley, supra*; (2) that the *Crawley* decision was incorrect and the Civil Service Commission should not have complied with the mandate of the Court of Appeals in 1931; and (3) that the clear language of Section 18 of the Veterans' Preference Act of 1944, *supra*, p. 2, is not controlling. These contentions do not present substantial questions; there are no conflicts with other cases; and the issue is a narrow and unimportant one. Accordingly, further review by this Court is unwarranted.

1. The ruling of the Civil Service Commission in 1931 was made pursuant to a final and controlling decision by the Court of Appeals for the District of Columbia in the *Crawley* case. In this suit the Court of Appeals has dispelled any doubts as to the meaning of its decision in *Crawley* and has expressly affirmed the meaning given that case by the Civil Service Commission.

Later decisions by the Court of Appeals and this Court do not conflict with the instant decision. In *Patterson* v. *Lamb*, 329 U. S. 539, the issue was whether an inductee whose sole military duty was reporting to the railroad platform for transportation to a military camp, and who was then sent home because of the World War I armistice, was entitled to an honorable discharge certificate for his military service instead of the discharge from draft certificate which had been issued to him. This Court held that the type of discharge granted was discretionary with the Secretary of War and that the discharge given was

correct.[1] Lamb desired the honorable discharge because of its impact on certain state taxes; the veterans federal-employment legislation of Congress was not in issue.

In the 1952 case of *McDougall* v. *United States Civil Service Commission*, 92 U. S. App. D. C. 69, 202 F. 2d 361, certiorari denied, 345 U. S. 969, the Court of Appeals held that a person presenting a discharge from the draft was not entitled to veterans preference claimed under the general "ex-serviceman" provisions of Section 2 of the 1944 Act.[2] The preference was first claimed after the passage of the 1944 Act and no mention was made of, or reliance placed upon, the previous acts, Section 18 of the 1944 Act, or the *Crawley* decision. Only the general terms of Section 2 of the 1944 Act were involved.

In deciding *McDougall*, the Court of Appeals relied in part on the case of *Mitchell* v. *Cohen*, 333 U. S. 411, but that case was also based on the 1944 Act and the term "ex-serviceman" as it applied to a member of the Voluntary Port Security Force of the Coast Guard Reserve. In commenting on the issue presented in the present case, this Court in *Mitchell* v. *Cohen* recognized the validity of preferences granted

[1] In *Davis* v. *Woodring*, 72 App. D. C. 83, 111 F. 2d 523, the Court of Appeals for the District of Columbia, while refusing to change a discharge from the draft to an honorable discharge, expressly recognized that the service leading to the discharge from the draft had been under "honorable conditions." 111 F. 2d 523, 525.

[2] Section 2 covers, *inter alia*, "(4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition * * *".

by Civil Service Commission rules and regulations prior to the 1944 Act. 333 U. S. 411, 422, 423.

2. Petitioner also argues, as he did below, that a literal reading of the clear language in Section 18 of the 1944 Act, *supra*, p. 2, would result in an absurdity by allowing a veteran with a short period of military service a preference as absolute as that of veterans with a much longer period of service. If Congress had felt that such a difference should be recognized, it would have so molded the statute. The possible unfairness of granting equal preferences was carefully pointed out to Congress before the 1944 Act, but Congress nevertheless passed the Act without making any allowances for differences in length of service.[3] As the Court of Appeals recognized, the statute preserves preferences granted prior to 1944 in the clear and unambiguous language of Section 18 of the 1944 Act. The preference granted to Friedman in 1942, pursuant to the Court of Appeals *Crawley* decision in 1931, was accordingly preserved.

3. The question presented is a restricted one, relating only to World War I veterans with discharges from the draft who had been granted veterans preference prior to the 1944 Act. On that issue the ruling of the District of Columbia Circuit is sufficient.

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[3] See *Hilton* v. *Sullivan*, 334 U. S. 323, in which this Court reviewed the hearings of the Senate Committee in which this unfairness was urged. It was pointed out to the Senate Committee that the 1944 Act would be "'substantially the same' as the 1912 Act, which, as before pointed out, provided for an absolute veterans' retention preference without regard to length of service." 334 U. S. 323, 338.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 286

IN THE

Supreme Court of the United States

October Term, 1958

EDGAR V. MAHER,

Petitioner,

v.

HARRIS ELLSWORTH, ET AL.,

Respondents.

PETITION FOR A REHEARING ON A PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A REHEARING ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Edgar V. Maher, files this petition for rehearing in the matter of the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The petition was denied on October 13, 1958, and this petition for a rehearing is filed within twenty-five days thereafter in accordance with Rule 58 of this Honorable Court.

In presenting this petition for rehearing, the petitioner brings to the attention of the Court matters and decisions not referred to in the original petition. In thus presenting this petition counsel for the petitioner begs the Court its indulgence in commenting on the decision of the United

States Court of Appeals below in presenting frankly why the opinion of the United States Court of Appeals is without precedent and reaches a height of absurdity and terminates with a holding that is frankly outrageous, and contrary to all of the statutes granting preference to veterans in governmental employment. The height of absurdity of statutory construction is reached when it is realized that the Court of Appeals below had ruled that an employee never sworn into the military service of the United States is entitled to veterans preference. Could there be a more silly conclusion or a more outrageous conclusion of law when all the hearings of Congress, all of the statutes, Executive Orders of the President of the United States, never since the year 1865 to the present time ever granted veterans preference except to honorably discharged soldiers, sailors or marines, or their dependents in certain instances, and never to any person who on his own account was not accepted for military service.

If the opinion of the Court below was not so serious as far as this petitioner was concerned, it could be laughed and scoffed at by all members of Congress who will be greatly surprised to find that they granted veterans preference to a man never accepted in the military service of the United States.

Counsel for the petitioner believes that any member of this Court who took five minutes to examine the briefs of the respective parties would, and must, conclude that the Court of Appeals below committed grievous error clearly contrary to the intention and purpose of the Congress of the United States in granting preference to veterans.

In presenting this petition for rehearing, counsel for the petitioner reiterates each and every matter and thing contained in the original petition filed herein.

Although the Army, Navy and Marine Corps granted numerous types of discharges from the service, Congress and the Executive Orders of the President of the United States have never granted preference to veterans except those who held honorable discharges from the service. This Court held in the case of Patterson v. Lamb, 329 U.S. 539, 91 L.Ed. 485, that a man discharged from the draft was not entitled to an honorable discharge, reversing the Court of Appeals below who had held that he was so entitled (154 F.2d 319).

In that case this Court, speaking through Mr. Justice Black, among other things said:

> "The only statute which directly bears upon "certificates of discharge" for enlisted men, Article of War 108, set out below, does not particularly prescribe the types or contents of certificates authorized to be granted. But pursuant to authority granted by Congress, the War Department many years ago promulgated Army Regulation No. 150 which provided for three types of certificates of discharge: honorable, dishonorable, and unclassified. An honorable discharge was one granted to a soldier whose conduct in service had been such as to warrant his re-enlistment. This regulation was well suited to fit cases of soldiers who had enlisted under ordinary conditions, had seen service and had been discharged in the course of regular Army routine. On its face, however, it shows how poorly it was adapted to fit the extraordinary circumstances bound to develop in connection with a nation-wide program for passing upon acceptances, rejections, and discharges of draftees in the course of their progress from their homes to their complete and final integration into the Army. So after the passage of the (May 18) 1917 Draft Act, 40 Stat. 76, c. 15, the War Department, on January 12, 1918, issued its Circular No. 651 in which it made provision for men discharged from draft as distinguished from men discharged from the Army. This provision, in effect, when respondent reported for induction, had particular, though not necessarily

exclusive, reference to draftees rejected for one reason or another at mobilization camps after their induction at their local draft boards. But despite the fact that draftees became subject to military law and duty from the moment of their arrival for entrainment at the local board, Selective Service Regulation 174-176 provided that they nevertheless were not finally accepted for military service, and could be rejected after arrival at camp. And it was not until they had been finally accepted that they could or would be assigned to full-fledged duty as soldiers." (329 U.S. 542)

Friedman, the employee who was held by the Court below to have veterans preference, was exactly in the same status as Lamb was in the case of Patterson v. Lamb, supra. The conflict of opinions between the decisions of this Court in the case of Patterson v. Lamb, supra, and the decision of the Court of Appeals below is apparent, and alone furnishes the proper grounds for the issuance of the writ of certiorari in this case.

Congress, in granting benefits to veterans such as compensation, burial allowances, G.I. Bill benefits, and many others, has always required that the veteran have an honorable discharge.

The bills introduced in 1944 to consolidate the various acts of Congress granting preference to veterans in governmental employment was captioned by the Committee in its hearings as follows: "Bills to give Honorably Discharged Veterans, their widows, and the wives of Disabled Veterans who themselves are not qualified preference in employment where federal funds are disbursed". (Hearings on S. 1762 and H. R. 4115, 78th Cong. Second Session May 19 and 23, 1944).

In the hearings before the Senate Committee, the following testimony was given by Commissioner Flemming

then a member of the United States Civil Service Commission:

"Mr. FLEMMING. Mr. Chairman, members of the committee:

The Civil Service Commission was requested by the Chairman to report on H.R. 4115, as passed by the House of Representatives. We have submitted a favorable report, suggesting one minor amendment, to which I will refer a little later.

I think possibly in understanding the provisions of H.R. 4115 it is helpful to realize that there have been preference laws on the statute books dated back to 1865. From 1865 to 1919, by law, the preference was limited to persons who were honorably discharged by reason of disability resulting from wounds or sickness incurred in the line of duty.

On March 3, 1919, the Congress in considering the preference problems arising out of the last war extended the preference to all honorably discharged veterans and their widows. Then, a few months afterward, namely, July 11, 1919, the Congress added to that they wives of injured veterans, whose husbands were not qualified to hold such positions.

Following the passage of the 1919 laws, there have been a series of executive orders, spelling out just what preference means, particularly in the classified service. I will refer to those executive orders as I discuss the various provisions of the bill.

I might say that the provisions of March 3, 1919, and July 11, 1919, laws were brought together and incorporated in a law passed in 1929.

I do not think it is necessary for me to discuss any further section 2. That has been discussed by Congressman Starnes and also Congressman LaFollette. Your attention has already been called to the changes made in existing law by the proposed section 2.

Senator BYRD. Mr. Flemming, at the bottom of section 2, it states "during any war, or in any campaign or expedition (for which a campaign badge has been authorized)." Is that existing law?

Mr. FLEMMING. No; there is one change there. Under existing law the so-called peacetime veteran receives prefefence. Under section 2 of H.R. 4115

he would not receive it in the future but section 18 which preserves any rights which have already been granted to peacetime veterans." (Senate Hearings, Pg. 16-17)

Not only was consideration given to other types of discharges other than honorable to veterans, but the Committee was urged to include in the bill those service men who held "blue discharges", and also "dishonorable discharges".

The following is extracted from the hearings:

Telegram dated April 6, 1944 (page 69 of hearings) from J. L. Bass urging amendments to bill to grant preference to bad conduct discharges.

Letter dated April 15, 1944, J. L. Deetz, recommending dishonorably discharged servicemen be given attention in preference bill:

"The committee probably knows there is in the armed forces a discharge called "blue discharge," which takes neither the rating of an honorable nor dishonorable discharge, but is intermediate. That sort of discharge is given in the case of a man who may be in the guard house too often or is a slacker or has bad habits or whose service is not considered for the good of the Nation but whose bad conduct does not reach such a point that the armed forces want to give him a dishonorable discharge. Consequently, he is given the discharge from the Army for the good of the service, that is not considered to be either honorable or dishonorable.

As I understand the bill—Mr. Flemming, you will correct me if I am wrong—a man who has had the blue type of discharge would not have any preference rights under this bill.

Mr. FLEMMING. If I am fully acquainted with the nature of the blue discharge, that is correct. In other words, the language "who has served honorably" has to be an affirmative showing he has served honorably in any branch of the armed forces before he is granted preference.

Senator BYRD. Do I understand, Mr. Chairman, the blue discharge is given to a slacker?

The CHAIRMAN. To a man who is not on his toes.

Senator BYRD. If that is the case, we do not want to give a slacker any preference.

The CHAIRMAN. I would agree with you.

Senator BYRD. I would like it clarified. If that is the case, that they give a blue discharge to a man who is a slacker, I certainly would not be willing to give him preference.

The CHAIRMAN. Very often a member of the armed forces who is lazy in his work, perhaps insubordinate, perhaps excessive drinking or otherwise displays undesirable qualities, he may be discharged out of the armed forces without either an honorable or dishonorable discharge, but merely returned to civilian life for the good of the service.

Senator BYRD. He should not be awarded then these preferences.

I might say that in certain cases the Army and Navy give that type of discharge to a man who is sort of a psychopathic case that cannot get along with his fellow men in the Army or with his officers.

Mr. RICE. Lest there should be any misconception concerning the matter, it is my understanding under the language on page 2, lines 6 and 7, "those ex-service men and women who have served honorably in any branch of the armed forces", would indicate as long as they did not have a dishonorable discharge they would be eligible for preference.

Under sub-section 4 of section 2 it states an honorable discharge is required but those who were discharged with disability do not necessarily have to have what is called an honorable discharge in order to be entitled to preference under section 2 of this bill.

If there is any other interpretation, it certainly ought to be cleared up.

The CHAIRMAN. Mr. Flemming, you have this entire situation in mind, have you, and you can discuss it with us at the executive session?

Mr. FLEMMING. Our understanding ties in with what Mr. Rice has just said. We agree with Mr.

Rice there has to be an affirmative showing of honorable service, that is right.

The CHAIRMAN. I was advised this morning by someone from the military service, from the Military Affairs Committee, that in the opinion of the Army anybody who had received a blue discharge would not be considered to have served honorably.

Mr. RICE. There is a distinction there. There are three different groups; those who have been discharged dishonorably; those discharged without honor, as in the case of some physical condition or mental condition; and those who have been discharged honorably. Those who have been discharged with some notation of a physical condition we consider to have had honorable service.

The CHAIRMAN. Well, I did not get that advice from the Army. They said they would not give the blue discharge to anybody they had considered had served honorably. They only used it where they thought the man was not serving honorably.

Mr. RICE. I do not like to rise again on this point. It is true probably that the Army has made some mistakes in giving blue discharges to persons who were discharged actually because of a physical condition. The Army as well as the Navy has given assurance that where there has been a mistake in those special cases they will be glad to correct the mistake and issue a new certificate.

The CHAIRMAN. Of honorable discharge?

Mr. RICE. Yes; showing an honorable discharge." (Pp. 69, 70, 71 Hearings)

It is clear from the hearings that section 18, which was incorporated in the Act (page 4-5 original petition, 5 U.S.C. 867), was incorporated only for the purpose of protecting the rights of so-called peacetime veterans with honorable discharges.

"Mr. JOHNSON. There is no discrimination of any kind now existing against the Regulars.

The CHAIRMAN. You mean they are still judged by the same standard as the wartime veteran even though we pass this bill?

Mr. FLEMMING. No; that is not so.

The CHAIRMAN. That is what my question is directed to.

Mr. FLEMMING. No, Mr. Chairman; under this bill the regular veteran that Mr. Johnson is talking about would not be extended preference, that is, the person who files in the future for a civil-service examination would not be given the 5 points and 10 points and put at the top of the list.

The CHAIRMAN. Well, then, this bill in effect does repeal the existing Executive orders in that respect?

Mr. FLEMMING. That is right. The thing it does not do is this: Let me take the case of Mr. A, who in the past came into the Federal service. He is a regular veteran and he has been extended preference and is still serving. Now, if it became necessary in the agency in which he is serving to put into effect a reduction-in-force program, he would be regarded as a veteran in the development or the building up of the reduction-in-force list. Section 18 has the effect of not taking away from him that which he has already been granted.

The CHAIRMAN. It has become a vested right, in other words.

Mr. FLEMMING. "Section 18 would protect that." (Pp. 59-60 of Hearings)

A decision that a man discharged from the draft and never accepted for military service is accorded veterans preference is so foreign to the purposes of granting preference to veterans in governmental employment that it reaches an absurdity. No Judge who gave any study to the purposes of the legislation could reach such a silly conclusion.

This Court held in the case of Church of Holy Trinity v. United States, 143 U.S. 457, 36 L.Ed. 226 that if a literal construction of a statute be absurd the Court must restrain the words. All laws should receive a sensible

construction. In construing an Act, the function of the Courts is to effect the intent of Congress.

Section 18, the saving clause, should be construed in accordance with the intent of Congress. All of the statutes, and executive orders clearly show that it never was the intent of Congress to grant preference to employees never actually sworn into the service of the United States.

The construction placed on Section 18, the saving clause, by the Court below is so utterly absurd that it is the duty of this Court to grant the application for a writ of certiorari. Otherwise, you have judicial legislation based on a void order of the Civil Service Commission granting an employee preference in employment when in fact none ever existed.

The Court of Appeals below has been reversed in the case of Mitchell v. Cohen, 333 U.S. 411, a case involving veterans preference. It was also reversed in Patterson v. Lamb, supra, in a case which directly involved veterans preference as to the right to receive an honorable discharge. The Court now apparently has reversed its former opinion in the case of McDougall v. Civil Service Commission, 92 U.S. App. D.C. 69, and in so doing its opinion conflicts with the decision of this Court in the case of Patterson v. Lamb, supra. This Court denied certiorari in the McDougall case, 345 U.S. 969. The opinions of the Court of Appeals below show that the members either do not understand the purposes of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 851) or else they have tried to expand the same by judicial legislation.

CONCLUSION

WHEREFORE, The petitioner prays that the order of this Court entered on October 13, 1958 denying the application for a writ of certiorari be set aside, and that

this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, and upon a review, that the judgment of the said Court of Appeals be in all things reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Claude L. Dawson, attorney for the petitioner, do hereby certify that this petition for a rehearing in this cause is made in good faith and not for the purposes of delay.

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